EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

90-1901

No. A-786

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

ESTATE OF KATHLEEN JO PRICE, Deceased, JANINE ADAMICK and JOSEPH ADAMICK,

Petitioners,

vs.

NEVADA RESORT ASSOCIATION, BALLY'S, INC., formerly known as MGM, INC. and MGM GRAND HOTEL, INC., ELIAS GHANEM, THOMAS BYER, LAS VEGAS MEDICAL CENTER, MGM GRAND HOTEL, INC. AND CERTAIN SUBSIDIARIES; TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY; TRUSTEES OF NEVADA RESORT ASSOCIATION HEALTH AND WELFARE TRUST; and METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JANICE M. HAYES
Nevada Bar # 001881
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135
Attorney for Petitioners

QUESTIONS PRESENTED

1. Did the district court abuse its discretion when it imposed Rule 11 sanction on an attorney, when the court orally dismissed some, but not all, defendants, ordered counsel to file a Second Amended Complaint in five days; counsel included these in said complaint with a qualifying statement that she did so to preserve her clients' rights, the court granted defendants's motions to strike references to them in January, 1986, and the court did not consider alternatives such as dismissing defendants from the Second Amended Complaint?

2. Did counsel reasonably believe that her clients had standing to continue litigation after the death of the original plaintiff under E.R.I.S.A., 29 U.S.C. §1002(8), 18 U.S.C. §1962, 29 U.S.C. § 1132(a)(1)(b) and under Nevada law, and

other well founded beliefs regarding a non-defendant insurance company's attorneys' allegations that decedents' death may be due to actions of MGM and other defendants, and is there a conflict between statutes governing employee benefit plans and Nevada's at-will employment statutes?

3. Is there a conflict between the circuits as to whether an Order granting a motion to strike references to defendants in an amended complaint is a final order, and do district judges grant motions to strike to avoid ruling on the merits and on controversial claims?

4. Did counsel receive a due process hearing at oral argument as the court had already prejudged the issue, had limited argument to the sanctions issue only and did not know another consolidated case was to be heard and had not read briefs?

PARTIES

The real party in interest in the proceedings below is Janice M. Hayes, counsel for the nominal plaintiffs-appellants, Estate of Kathleen Jo Price, Deceased, Janine Adamick and Joseph Adamick, who were substituted as plaintiffs upon the death of the original plaintiff, Kathleen Jo Price, their adult daughter.

This case concerns collateral orders of the district court imposing sanctions on counsel only and releasing an appeal bond to defendants before the sanctions appeal was decided, each of which orders in a final, immediately appealable order in the Ninth Circuit Court of Appeals.

Only defendants-appellees Thomas Byer, M.D., Elias Ghanem, M.D., and Las Vegas Medical Center were appellees and they are the only respondents herein.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	v
OPINIONS BELOW.....	2
JURISDICTION	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	11
I. The District Court Abused Its Discretion When It Imposed Rule 11 Sanctions On An Attorney, And Did Not Consider The Alternative Of Dismissing Some Defendants From A Second Amended Complaint.	6, 28
II. Counsel Reasonably Believed That Her Clients Had Standing To Continue Litigation After The Death Of The Original Plaintiff, And Is There A Conflict Between 29 U.S.C. §1001, *et seq.* Employee Benefit statutes and Nevada's At-Will Employment Statutes?	14

TABLE OF CONTENTS (cont.)

Page

III. There is a conflict between the Circuits as to whether a motion to strike references to defendants in a complaint is a final order, and Nevada district judges grant said motions to avoid ruling on the merits. 18

IV. The Ninth Circuit Court Of Appeals has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by the district court as to call for the exercise of this Court's power of supervision. 20

CONCLUSION 29

Appendix 1a

TABLE OF AUTHORITIES

	Page
CASES CITED	
California v. Harvier, 700 F. 2d 1217, 1218, cert. den., 464 U.S. 280 (1983)	12, 24
Cooter & Gell v. Hartmax Corp., 110 S.Ct. 2447, 2454 (1990)	28
Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F. 2d 1531 (9th Cir. 1986)	28
Harper v. American Chambers Life Ins. Co., 898 F. 2d 1432 (9th Cir. 1990)	15
Frank Bristoe v. Morrison-Knudsen Co., 776 F. 2d 1414 (9th Cir. 1976)	13
Kunin V. Benefit Trust, 910 F. 2d 534 (9th Cir. 1990)	13

TABLE OF CONTENTS (cont.)

	Page
CASES CITED	
Mesirow v. Pepperidge Farm, Inc., 703 F. 2d 339, (9th Cir. 1983)	3, 9a
School Board of Nassau County, Fla. v. Arline, 107 S. Ct. 1123, (1987)	12
United States v. Indrelunas, 411 U.S. 216, (1973)	12
Zaldivar v. City of Los Angeles, 780 F. 2d 823 (9th Cir. 1986)	28
UNITED STATES CONSTITUTION	
First Amendment	5, 14 20, 31
Fifth Amendment	5, 14, 20, 31
Fourteenth Amendment	5, 6, 14, 20

TABLE OF CONTENTS (cont.)

	Page
UNITED STATES STATUTES	
18 U.S.C. §1962	15
28 U.S.C. §1254(1)	3
28 U.S.C. §1291	3
29 U.S.C. §794	8, 12
29 U.S.C. §1002, et seq.,	8, 12, 15, 17, 24
29 U.S.C. §1002(8)	16
29 U.S.C. §1132(a)(1)(b)	16
SUPREME COURT RULE 10.1 (a), (c)	30
FEDERAL RULES OF CIVIL PROCEDURE	
Rule 11	5, 6, 28, 29
Rule 12(b)6	5
Rule 12(f)	5, 13, 18, 18, 19, 30
15(c)	5
54(b)	5, 12, 13, 19, 20, 22, 25,

TABLE OF CONTENTS (cont.)

	Page
Federal Rule Of Civil Procedure 58	5, 12, 23

OTHER AUTHORITIES AND CASES

Nevada Revised Statute 686.310(3) and (5)	17
Ninth Circuit Rule 27-1	27
Circuit Advisory Committee Note To Circuit Rule 27-1	27
Astrid Ekman, et al. v. Nevada Gaming Commission, et al., (Original title in state court) removed as CV-S-88-997, HDM, on appeal as No. 89-16209, sub-title, Hayes v. IRS.	27

No. A-786

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ESTATE OF KATHLEEN JO PRICE,

Deceased, et al.,

Petitioners,

vs.

NEVADA RESORT ASSOCIATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners and their counsel, Janice M. Hayes, Real Party In Interest, respectfully pray that this Court issue a Writ of Certiorari to review the Memorandum order of the United States Court

of Appeals for the Ninth Circuit in Nos. 87-2575 and 89-16462, consolidated appeals from collateral orders in *Estate of Kathleen Jo Price, Deceased, et al. v. Nevada Resort Association, et al,* which was entered on November 21, 1990, and appears in the appendix herein as p. 1a.

OPINIONS BELOW

The Memorandum order of the Court of Appeals was not reported and is at p. 1a. The Order of the District Court for the District of Nevada in Case No. CV-S-84-447 - PMP, *Estate of Kathleen Jo Price, Deceased, et al. v. Bally's Grand, Inc., fka MGM Grand Hotels, Inc., et al,* which imposed sanctions on counsel only, 14a, was entered on July 8, 1987 and was not reported. The Order of the Court of Appeals denying a petition for rehearing, entered January 25, 1991, was not reported and is at 24a.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1). The Order of the Court of of Appeals sought to be reviewed was issued on November 21, 1990, 1a, infra. Circuit Judge Harry Pregerson granted an extension of time to December 28, 1990, to file a petition for rehearing by Order entered on December 14, 1990, 26a.

Counsel timely mailed the petition for rehearing by Express Mail, Return Receipt Requested, and the U.S. Postal Service attempted delivery to the court at 1:30 p.m. on December 28, 1990, but found no one on duty to receive the package. The Postal Service's statement is at 2a.

The petition was filed on January 2, 1991, as the court was closed on December 29, 30 and 31, 1990 and January 1, 1991. The clerk's staff assured counsel that

the petition was deemed timely and would not have been filed if it were considered to be untimely.

Counsel, nevertheless, sent a motion for leave to file the already received petition late, which was delivered by Federal Express on January , 1991. The Clerk again advised counsel that the petition was timely filed and that her motion was unnecessary.

The court of appeals issued an Order denying the petition for rehearing, without comment, on January 25, 1991, 2 a.

By Order dated April 19, 1991,, the Honorable Sandra Day O'Connor granted an extension to May 24, 1991, in which to file a Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules which are relevant to the

determination of this case are the First, Fifth and Fourteenth Amendments to the United States Constitution, Rules 11, 12(b)(6), 12(f), 15(c), 54(b) and 58 of the Federal Rules of Civil Procedure and an attorney's right and duty to properly represent her client's interests.

The First Amendment provides in relevant part:

> Congress shall make no law . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution provides in relevant part:

> (N)or shall any person be deprived of life, liberty or property without due process of law. . .

Counsel also respectfully suggests that although this petition concerns the imposition of sanctions on counsel in a

federal court, the provision of the Fourteenth Amendment concerning denial of the equal protection of the laws is applicable.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part that

> The signature of an attorney or party constitutes a certificate by the signer that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and that if a pleading, motion or other paper is signed in violation of this rule, the court shall impose upon the person who signed it an appropriate sanction.

STATEMENT OF THE CASE

This case concerns the unwarranted imposition of sanctions on an attorney, Janice M. Hayes, real party in interest, because she included claims which Nevada District Judge Howard D. McKibben orally dismissed in a Second Amended Complaint,

which the district judge ordered counsel to file in five days or risk dismissal of her client's entire case. The sanctions were imposed notwithstanding that Hayes noted the court's oral order in the Second Amended Complaint and stated that she included several defendants to protect her clients as there was no written order dismissing them.or claims.

This petition concerns Orders pertaining to only three defendants in the multi-party suit, Elias Ghanem, Md., Las Vegas Medical Center and Thomas Byer, M.D., and they are the only respondents in this court.

The original sole plaintiff, Kathleen Jo Price, brought an action in federal court on July 12, 1984, alleging that all defendants acted and conspired together in a common scheme to deprive her and other employees of certain Las Vegas casino-hotels of continued employment, sick

leave, medical treatment or surgery, insurance, salary continuance benefits and other programs established under ERISA, Employees Retirement Income Security Act, 29 U.S.C. §1002, et seq., or unemployment or worker's compensation benefits or alteration in working conditions, under The Rehabilitation Act of 1973, §504, as amended, 29 U.S.C. §794.

Price also alleged retaliatory discharge for previously filing a Worker's Compensation claim and sex discrimination as to equal pay, insurance and leave.

Price was injured in July, 1984 when she tripped over a pothole in MGM's employee's parking lot and hit her head. She was transported to Ghanem's Medical Center by MGM employees in a MGM vehicle. Ghanem's bill were apparently paid either under MGM's self-insured worker's compensation or by MGM's employee insurance.

Price continued to work. When she appeared ill when she arrived at work one day, she was transported by MGM staff to Respondent Ghanem's clinic, where Ghanem found she possibly had lupus erythmatosus and advised she take sick leave. MGM fired her a few days later, claiming she had taken unauthorized leave.

The Nevada Employment Security Department found no misconduct and awarded Price unemployment benefits.

Price alleged that Ghanem deliberately composed a note to MGM that he knew MGM would find inadequate. Ghanem and Byer submitted Affidavits in support of MGM at the unemployment appeal hearing, although Price's health was not at issue.

Ghanem is an extremely wealthy doctor who, without justification, tried to prevent Price from receiving $96 a week. Her medical insurance terminated when she was fired, and she became virtually

uninsurable and unemployable when prospective employers found she had been diagnosed as possibly having lupus.

Price filed the instant action on July 12, 1984. She died unexpectedly of accidental poisoning on July 19, 1984.

The original complaint was not served on any defendant. Price's parents filed an Amended Complaint Of Right on April 3, 1985, substituting Price's Estate and naming Janine and Joseph Adamick as plaintiffs.

The district court held a hearing on various motions to dismiss and for summary judgment and sua sponte, ordered or gave plaintiffs' five days to file a Second Amended Complaint on January 7, 1986.

The court did not rule on all claims as to all defendants. It orally granted summary judgment to the Ghanem defendants for alleged want of federal subject matter jurisdiction and ordered defendants'

counsel to file a Second Amended Complaint in five days. Counsel included dismissed claims with a qualifying statement that she did so to preserve her client's rights.

Defendants moved to strike references to them. The district court granted said motions and imposed sanctions on plaintiff's counsel.

The court of appeals affirmed. It erroneously believed that a final order had been entered and did not have all materials available to it, as set out in the reasons for granting the writ.

REASONS FOR GRANTING THE WRIT

The district court acted arbitrarily in entering an oral order dismissing some, but not all defendants, and then ordering counsel to file a Second Amended Complaint in five days.

The court refused to rule on one

defendant, MGM Grand Hotels and Certain Subsidiaries, which is the E.R.I.S.A. plan sponsor and administrator named in MGM's Employee handbook. Judge McKibben declared that it was "a non-existent entity. The refusal to rule as to one defendant prevents any judgment from being final, **California v. Harvier**, 700 F. 2d 1217, 1218, **cert denied**, 464 U.S. 820 (1983). Plaintiffs have never abandoned their objection to lack of a final judgment, citing **United States v. Indrelunas**, 411 U.S. 216, 93 S. Ct. 1562, 36 L.Ed 202 (1973).

Plaintiffs' contention that Price stated a claim under Section 504 of the Re-Habilitation Act of 1973, 29 U.S.C. §794, as MGM discriminated against her and fired her because of its perception was validated by this court's decision in **School Board of Nassau County, Fla. v. Arline**, 107 S. Ct. 1123 (1987). The

Court of Appeals' decision in **Kunin v. Benefit Trust**, 910 F. 2d 534 (9th Cir. 1990), indicated that persons such as the Adamicks, beneficiaries of Price's life insurance policies, had standing.

The district court intentionally issued defective orders under Rule 54(b), which plaintiffs were forced to appeal. The court of appeals dismissed appeals 87-1941, 87-2309 and part of 87-2575 for this reason, citing **Briscoe v. Morrison-Knudsen Co.** 776 F2d 1414 (9th Cir. 1976). The district court also ruled that a grant of a motion to strike references to a defendant in a complaint is a final Order, which should have been appealed, in its August 10, 1988 Order, which he cited in the Judgment and Order, 23a and 24a, entered by Judge Pro on February 23, 1989. The Judgment is deficient on its face as it refers to a prior order in contravention of Fed. Rules of Civ. Proc. 54 and 58's

clear statement that a judgment shall not contain a recital of pleadings or a record of prior proceedings.

II. Counsel Reasonably Believed That Her Clients Had Standing To Continue Litigation After The Death Of The Original Plaintiff.

Counsel reasonably believed that her clients, Janine and Joseph Adamick, parents of the original plaintiff, Kathleen Price, had standing to continue the suit on several bases.

Under Nevada law, Peters v. Estate of Peters, 92 Nev. 687, 557 P. 2d 713, the Adamicks, who were benefciaries, would become owners of Price's life insurance policies immediately upon her death, had MGM not terminated her employment.

There is also an unresolved issue as to whether Price correctly believed that defendants Ghanem and Byer were her own

private physcians. If so, there is a caus of action against them for submitting Affidavits against her interest without her consent or request at the Unemployment Security Department hearing.

Price also alleged that the defendant doctors had acted together in a common scheme, actionable under 18 U.S.C. §1962, to terminate employment of persons who wer ill or perceived to be ill, and that all defendants benefitted from said scheme.

If Ghanem and Byer were participants in MGM's E.R.I.S.A. benefit plans for its employees, said fact was never disclosed, and the Adamicks have standing.

In Harper v. American Chambers Life Ins. Co., 898 F. 2d 1432 (9th Cir. 1990), the court found that E.R.I.S.A. preempts all state law claims of breach of contract, breach of the covenant of good faith and fair dealing. The court also found that the Harpers might be able to sue as

a participant or beneficiary of a plan, 29 U.S.C. §1132(a)(1)(b), and concluded they were "beneficiaries" under 29 U.S.C. §1002(8), at 1434.

In addition, the district court found the Adamicks had standing to prosecute a claim under Title VII based on sex discrimination as to pay and insurance benefits. and even set said matter for trial, over plaintiffs' objections as they wanted a trial as to all claims and defendants.

Petitioners had a good faith belief that the may have been a cause of or contributed to their daughter's death, as an insurance company, Fireman's Fund, now Amex, Inc., not a party to the suit, did not pay $50,000 in proceeds from and accidental death and dismemberment policy issued to Price through the Nevada Federal Credit Union, also not a defendant below, will not give a reason for its failure to do so or why it doubts the finding of the

Clark County Coroner that Price died by accidental means without any contributing causes as stated in the official Death Certificate. Fireman's attorneys have insinuated that Price's death may have been attributable in some way to respondents Ghanem and Byer or that there was a suicide due to unhappiness over the way MGM treated her or as a result of head injury. but refuse to give a reason for their beliefs as they are required to do under Nevada Revised Statute 686.310(3) and (5).

Petitioners are justified in not dismissing their claims against MGM and other defendants until these issues are resolved.

There is a conflict between Nevada's "at-will" employment termination statutes and the rights of workers under E.R.I.S.A. plans for their benefit and federal and state laws.

II. Is There A Conflict Between The Circuits As To Whether An Order Granting A Motion To Strike References To Defendants In A Second Amended Complaint Is A Final Order, And Are District Judges Impermissibly Entering Said Orders To Avoid Ruling On The Merits And Making Findings Of Fact And Conclusions Of Law As To Controversial Or Unpopular Issues And Claims Against Large Corporations And Nevada Casinos?

The Nevada District Court has found and many defendants allege that an Order granting a motion to strike references to defendants in an Amended Complaint Or Second Amended Complaint is a final Order, and the Ninth Circuit Court Of Appeals has apparently also adopted this theory,

where the district court's "judgment" was based on status reports of defendants, some of whom claimed that petitioners failed to appeal from different orders striking references to them in the Second Amended Complaint the court ordered counsel to file in five days.

District judges are thus issuing oral orders to amend a Complaint and then striking references to purportedly dismissed defendants in the complaint, which practice allows judges to enter final orders without stating any reason therefore, that they could not do by simply dismissing defendants without certifying the order as final under Rule 54(b) and giving a reason for its issuance and making findings of fact which can be challenged on appeal. Said practice also allows judges to avoid ruling on controversial issues and to avoid appellate review, if unwary counsel do not appeal.

IV. Did The Circuit Court Deprive Counsel Of The Right Of Access To The Court And A Due Process Hearing Secured By The First And Fifth Amendments When It Did Not Know Of Consolidation Of Another Appeal, Had Limited The Hearing To Sanctions Issue Only?

The merits panel of the Ninth Circuit Court of Appeals deprived counsel Janice Hayes of her Fifth Amendment right to due process and her right of access to the courts secured by the First Amendment, as it had prejudged the case, and could not reasonably believe that a motions panel's order dismissing an appeal because the district court's certification of an Order under Rule 54(b) was defective, which pertained to appellants other than the respondents herein, was an adjudication on the merits. The

merits panel referred to a motions panel's Order of April 20. 1989, in its Memorandum at 2a, referring to the case before it, 87-2575, and saying 3a, that "a panel of this court dismissed the appeal," thereby erroneously implying that a motions panel had "dismissed" the issue of the sanctions.

The court of appeals was unaware of the motion panels' Order of March 9, 1990, consolidating 87-2575, (sanctions) and 89-16462, (premature release of an appeal bond by the district court), and requiring appellants to file yet another Opening Brief, 6a. Appellants thus had to file four Opening Briefs on the above issues alone and several Excerpts of Record and ask the court to consider the transcripts already on file in the three other appeals, all taken from the same district court case. The hearing panel was unaware of other orders entered by

motions panels, including the September 1, 1989 Order which reinstated that part of 87-2575 which concerned the sanctions appeal, 8a, infra, or that the April 20, 1989 order, 10a, dismissed only that part of 87-2575, which dismissed the Trustees of the Nevada Resort Association Health and Welfare Trust for want of a proper Rule 54(b) certification, or the Order filed May 2, 1988, 12a, infra, which dismissed No. 87-1941, an appeal from another intentionally defective Rule 54(b) Order issued by District Judge Howard McKibben of Nevada.

The May 2, 1988 Order, 12a, also dismissed No. 87-2309, which concerned another deficient Rule 54(b) Order as to the respondents herein, Elias Ghanem, Thomas Byer and Las Vegas Medical Center.

The merit panel was unaware that Judge McKibben had entered three 54(b)

"judgments" which omitted the requisite determination, "there is no just reason for delay," until Hayes told them at oral argument. The hearing panel clearly also had not read briefs which they did not know existed.

Hayes did not know at argument that the panel did not know about later orders of motions panel and the clerk, 6a., nor that the panel impermissibly relied upon the errenous statements of opposing counsel that the underlying case had been dismissed. The May 2, 1988 Order of a motions panel, 8a, erroneously stated at 9a, "Here, the district court entered final judgment February 23, 1989. However, the court is informed that plaintiffs filed a timely post-judgment for reconsideration."

The issue of a final judgment has never been before the court of appeals as there is no final judgment in the

underlying case. The district court refused to enter any order as to defendant MGM Grand Hotels, Inc. and Certain Subsidiaries, which is the E.R.I.S.A. plan sponsor and administration of employee insurance plans listed in MGM's Employees Handbook, claiming it was a "non-existent entity." In fact, District Judge McKibben imposed a $200 sanction on counsel for listing this entity as a defendant. He relied on a stipulation between plaintiffs and defendants MGM and Nevada Resort Association, represented by the same counsel, and approved by the court, 21a. Said Stipulation, however, contained no reference to MGM Grand Hotels, Inc. and Certain Subsidiaries, 21a - 23a.

A judgment which omits any defendan is not a final order, California v. Harvier, 700 F. 2d 1217, 1218, cert denied 464 U.S. 820 (1983).

The judgment, 18a, is defective in

that it refers to another order, contrary to Federal Rule of Civil Procedure 54(b). "A judgment shall not include . . . the record of prior proceedings."

Incidentally, MGM's counsel listed MGM Grand Hotels , Inc. and Certain Subsidiaries as his client in appeal No. 86-2934, and sought attorney's fees on behalf of his non-existent client.

The district court's Judgment, 18a, was based solely on status reports of the parties. 19a, Order of February 23, 1989.

The merits panel was not the "neutral and detached" magistrate required by the Fifth Amendment. The hearing panel impermissibly relied on an impression that the sanctions issues had already been decided. It refused to hear counsel Hayes's motion for sanctions against counsel for the Ghanem appellees, Order, 4a, issued on November 1, 1990, and received by Hayes in Las Vegas just before she left for the

November 7, oral argument.

Counsel respectfully suggests that the panel had a purpose not disclosed to Hayes, i.e., it intended to impose additional sanctions, as the court schedules cases with related issues before the same panel and the other cases on calendar concerned one Robert Young, who had filed at least seventeen cases against the same persons and never paid sanctions imposed against him.

In contrast, Hayes filed only seven cases in ten years as an lawyer, none of them against the same defendants, and earlier cases in proper person before she became an attorney in 1980, challenging a Nevada procedural rule, which was changed in 1981 as Hayes had argued it should be.

Hayes has never filed an motion for Rule 54(b) certification.

Hayes is a plaintiff in an action removed by IRS wherein Hayes sought only

records pertaining to a 2½% stock certificate which she and her former client, allege to be an ownership interest in the Horseshoe Club in Las Vegas. Judge McKibben remanded the rest of the action. The case was CV-S-88-997-HDM and Case No. 89-16209 on appeal. A briefing schedule has just been set.

The references to "merits panel" and "motions panel" derives from Circuit Rule 27-1 and the Circuit Advisory Committee Note to Circuit Rule 27-1 (1), (2)(a), (b) and (c), which explain that Motions to dismiss, for clarification and similar motions are acted upon by a motions panel. The panel which makes a disposition as to the appeal is the merits panel. In this case, all orders except the Memorandum of November 12, 1990, 1a, and the Orders of November 1, 1990, 4a, December 14, 1990, 26a, and January 25, 1991, 24a, were issued by a motions panel, including the April 20, 1989 Order, 10a, on which the merits panel relied.

IV. THE RULE 11 VIOLATION CRITERIA OF 1984 AND 1985 SHOULD BE APPLIED.

The standard governing frivolousness and improper purpose are both objective, **Zaldivar v. City of Los Angeles**, 780 F. 2d 823, (9th Cir. 1986), cited in the circuit court's Memorandum. The **Cooter** court recognized that Rule 11 "must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy", at 2454. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," **Cooter**, at 2454.

Counsel filed the Second Amended Complaint prior to **Golden Eagle Distributing Corp. v. Burroughs Corp.**, 801 F. 2d 1531 (9th Cir. 1986) was decided.

The district court should have utized the least drastic remedy available

and simply dismissed all of the complaining defendants in one Order and certified that Order as final properly under Rule 54(b), thus having only one appeal to the court of appeals instead of five.

CONCLUSION

The district court erred in imposing sanctions on counsel when it ordered her to file a Second Amended Complaint in five days, orally dismissed some, but not all claims in a multi-defendant case and counsel timely filed said Complaint but included a qualifying phrase acknowledging the oral Order but saying she had to protect her clients' rights.

The district court should have used the least stringent measure, which would be to dismiss all of said defendants and claims in one Order and then certify the Order under Rule 54(b) as a final order, or not do so and allow plaintiffs to wait for a final order from which they

could notice an appeal.

The district court unnecessarily and intentionally multiplied the proceedings by certifying three separate order under Rule 54(b) and omitting the phrase that there is no just reason for delay, and spacing said orders far enough apart so that plaintiffs had to take another appeal each time.

The court of appeals so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of this court's supervision, pursuant to Supreme Court Rule 10(a), and by letting stand the lower court's ruling that an order striking references to a defendant from an amended complaint is a final order, it has entered an order in conflict with another court of appeals.

Counsel was deprived of a right of access to the court, a meaningful due process

hearing as the panel hearing oral argument had prejudged the case and believed erroneously that a motions panel had already dismissed the appeal, and of the equal protection of the laws, in violation of rights secured by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

JANICE M. HAYES, ESQ.
Nevada Bar # 001881
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135

Attorney for Petitioner

INDEX TO APPENDIX

Page

Memorandum of the Court of Appeals in Nos. 87-2575 and 89-16462 filed on November 21, 1991. 1a

Order of the Court of Appeals in No. 87-2575 only issued on November 1, 1991, that oral argument on November 7, 1991 would be limited to the sanctions order against counsel Janice Hayes. 4a

Order filed March 9, 1990 consolidating 87-2575 and 89-16462 and directing that yet another Opening Brief be filed. 6a

Order of the Court of Appeals granting motion for clarification, and reinstating that part of 87-2575 which concerned the sanctions order, entered on September 1, 1989 in appeal 87-2575 only, and directing appellants to file a new Opening Brief limited to the sanctions Order. 8a

Page

Order filed on April 20, 1989 in 87-2575 only, Judges Wallace, Alarcon and Norris, dismissing that part of 87-2575 which concerned the Trustees of the Nevada Resort Association Health and Welfare Trust, dismissing due to a defective Rule 54(b) certification. 10a

ORDER filed May 2, 1988, listing Nevada Resort Association as lead appellant, Judges Goodwin, Schroeder and Pregerson, Nos. 87-1941 and 87-2309 dismissing Transamerica Occidental Life Insurance Company, 87-1941, and the Ghanem defendants, 87-2309, because the district court's 54(b) certificates were deficient. 12a

ORDER filed July 8, 1987 in CV-84-447, HDM, listing Bally's Grand, Inc. as lead defendant, affirming then Magistrate Philip Pro's Order imposing sanctions on counsel Janice Hayes for allegedly forcing the Ghanem defendants to stay in the action after they were dismissed. 14a

Page

JUDGMENT IN A CIVIL CASE, filed February 23, 1989 in CV-S-84-447-PMP, dismissing action in favor of defendants. 18a

ORDER, filed February 23, 1989 in CV-S-84-447-PMP, entering judgment based upon status reports of parties and "in accordance with the Court's Order Dismissing this action entered Auguat 10, 1988." The Judgment, 18a, also referred to said August 10, 1988 Order. 19a

STIPULATION AND ORDER, filed April 25, 1985, between MGM's counsel and plaintiffs, which contains no reference to MGM Grand Hotels AND CERTAIN SUBSIDIARIES. 21a

Page

ORDER filed December 14, 1990 granting an extension of time to December 28, 1990 to file a petition for rehearing. 26a

ORDER filed January 25, 1991, denyiing the petition for rehearing and the motion for correction of clerical errors in the court's records. 24a

STATEMENT of U.S. Postal Service that it attempted delivery of petition for rehearing on due date, December 28, 1990 of counsel's Express Mail package to Court of Appeals. 27a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2575
89-16462

D.C. No. CV-84-447-PMP
D.C. No. CV-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased,
JANINE ADAMICK and JOSEPH ADAMICK,
Plaintiffs-Appellants,

NEVADA RESORT ASSOCIATION, BALLY'S,
INC., formerly known as MGM, INC. and
MGM GRAND HOTELS, INC., et al.,

Defendants-Appellees.

MEMORANDUM
(Filed November 21, 1990)

Appeal from collateral orders of the
United States District Court
For The District Of Nevada

The Honorable Howard D McKibben, Presiding,
The Honorable Philip M. Pro, Presiding

Argued and Submitted November 7, 1990
San Francisco, California

Before: BROWNING, PREGERSON, and TROTT,
Circuit Judges.

Janice Hayes, attorney for the estate of Kathleen Jo Price, appeals the district

court's orders (1) imposing Rule 11 sanctions against her in the amount of $3,000, (2) denying her motions for sanctions against Elias Ghanem, Thomas Byer, and Las Vegas Medical Center (collectively the Medical Defendants), and (3) releasing the bond Hayes posted to obtain a stay pending her appeal of the order imposing sanctions against her. We affirm.

The district court did not abuse its discretion in imposing sanctions against Janice Hayes based on her numerous filings of frivolous papers. See Cooter & Gell v. Hartmax Corp., 110 S.Ct. 2447, 2461 (1990). The court also acted within its discretion in refusing to award sanctions against the Medical Defendants. Hayes has not pointed to any conduct of the Medical Defendants that would justify the imposition of sanctions against them. Finally, the court did not err in releasing the bond given by Hayes pending her appeal (No. 87-2575) of

Hayes pending her appeal (No. 87-2575) of the order imposing sanctions against her because on April 20, 1989, a panel of this court dismissed the appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

D.C. No. CV-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, deceased; JANINE ADAMICK; JOSEPH ADAMICK;

Plaintiffs-Appellants

NEVADA RESORT ASSOCIATION; TRUSTEES OF NEVADA RESORT ASSOCIATION HEALTH & WELFARE TRUST; BALLY'S, formerly known as MGM GRAND HOTELS, INC.; METROPOLITAN LIFE INSURANCE COMPANY; ELIAS GHANEM, THOMAS BYER; MGM GRAND HOTEL, INC. AND CERTAIN SUBSIDIARIES; OCCIDENTAL LIFE INSURANCE COMPANY; LAS VEGAS MEDICAL CENTER,

Defendants-Appellees.

ORDER

(Filed November 1, 1990)

Appeal from the United States District Court For the District of Nevada

The Honorable Howard D. McKibben, Presiding

(Not argued)

Before: BROWNING, PREGERSON, and TROTT, Circuit Judges:

Circuit Judges:

Consistent with this court's order entered on September 1, 1989, this appeal is limited to review of the district court's Order of July 8, 1987 that imposed sanctions against appellants' counsel. Therefore, counsel for the Trustees of the Nevada Resort Association Health and Welfare Trust need not appear at oral argument because the appeal in its present posture does not involve any issue which (sic) they need be concerned.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

89-16464

D.C. No. CV-S-84-447-HDM
D.C. No. CV-S-84-447-PMP

ESTATE OF PRICE, et al. v.

NEVADA RESORT ASSOCIATION, et al.

ORDER

(Filed March 9, 1990)

Appellant's motion to file civil docketing statement late is Granted.

The Docketing Statement previously received shall be filed. Appellants' motion to file the Opening Brief late is Granted. The Opening Brief received on January 31, 1990 in 87-2575 and January 19, 1990 in 89-16462 shall be filed. The district court's statement of certification of record for 89-16462 will be issued forthwith.

Although separate Opening Briefs

have been filed in these appeals, the motion of appellees Ghanem, et al. to consolidate 87-2575 and 89-16462 is granted.

All answering briefs are now due on March 21, 1990. Appellees shall endeavor to comply with Circuit Rule 28-4.
The reply brief is now due on April 9, 1990.

The order is subject to reconsideration by a judge if an objection is filed within ten days.

Cole Benson

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

D.C. No. CV-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, et al.,

Plaintiffs-Appellants,

BALLY'S, formerly known as MGM, INC. and MGM GRAND HOTELS, INC., et al.,

Defendants-Appellees.

ORDER

(Filed September 1, 1989)

Appeal from the United States District Court For the District of Nevada

The Honorable Howard D. McKibben, Presiding

(Not argued)

Before: WALLACE, HUG and SKOPIL, Circuit Judges:

The motion for clarification is granted. In this appeal, appellants

sought review of, inter alia, the district court order of July 8, 1987 which imposed sanctions against appellants' counsel. An immediate appeal of this order was required because the order was final. See Mesirow v. Pepperidge Farm, Inc., 703 F. 2d 339, 345 (9th Cir. 1983). However, the district court had not yet entered an order disposing of appellants' timely motion for reconsideration. Hence, we lacked jurisdiction over the remaining issues. See Fed. R. Civ. P. 4(a)(4). Accordingly, this appeal is reinstated as to the July 8, 1987 sanctions order only.

Appellants shall file a new opening brief limited to the issues raised by the sanctions order within 30 days of this order. Upon entry of this order, the Clerk shall set the balance of the briefing schedule.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2575

D.C. NO. CV-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, Deceased,
JANINE ADAMICK and JOSEPH ADAMICK,

Plaintiffs-Appellants,

BALLY'S, formerly known as MGM, INC.
AND MGM GRAND HOTELS, INC., et al.

Defendants-Appellees.

ORDER
(Filed April 20, 1989)

Appeal from collateral orders of
The United States District Court
For The District Of Nevada

The Honorable Howard D. McKibben,
Presiding

(Not Argued)

Before: WALLACE, ALARCON and NORRIS,
Circuit Judges

Due to a defect in the Fed. R. Civ. P. 54(b) certification, this appeal was filed prematurely. Orders whose finality normally would depend upon a Rule 54(b) certification may be treated as

treated as final when the case has been reduced to final judgment. Baker v. Limber, 647 F. 2d 912, 916 (9th Cir. 1981). Here, the district court entered the final judgment February 23, 1989. However, the court is informed that plaintiffs filed a timely post-judgment for reconsideration. Thus, jurisdiction remains in the district court. Accordingly, this appeal is dismissed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 87-1941
87-2309

D.C. No. CV-84-447-HDM

JANINE ADAMICK, as Administrator of the Estate of KATHLEEN JO PRICE, et al.,
Estate of KATHLEEN JO PRICE, et al.,

Plaintiffs-Appellants,

NEVADA RESORT ASSOCIATION, et al.,

Defendants-Appellees.

ORDER

(Filed May 2, 1988)

Appeal from the United States District Court For the District of Nevada

The Honorable Howard McKibben, Presiding

(Not argued.)

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges:

The motion by appellees in appeal No 87-2309 to dismiss the appeals for lack of

jurisdiction is granted. The district court's orders of May 15, 1987 were not final, appealable orders as to these defendants because the orders did not dispose of all claims against these parties and the district court did not direct the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). 28 U.S.C. §1291.

Appeal No. 87-1941 is also dismissed for lack of jurisdiction. this court lacks jurisdiction because the district court's certification under Fed. R. Civ. P. 54(b) lacks the requisite express determination that there is no just cause for delay. See Frank Briscoe Co. v. Morrison-Knudsen Co. 776 F. 2d 1414 (9th Cir. 1976).

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, deceased, by its administratrix, JANINE ADAMICK, et al.,

Plaintiffs,

BALLY'S GRAND, INC., et al.,

Defendants.

ORDER ADOPTING MAGISTRATE'S ORDER

(Filed July 8, 1987)

On May 21, 1987, following a hearing arguments were heard in support of and in opposition to defendants Ghanem, Byer and Las Vegas Medical center's motion for sanctions, document 154, United States Magistrate Philip M. Pro entered an order imposing sanctions in the amount of #3,000. 00 against Janice M. Hayes, counsel for plaintiffs. Document number 193. Plaintiffs filed objections to the Magistrate's Order on June 5, 1987. Document number

198. Having considered the above-referenced pleadings, memoranda of the parties, and other relevant and timely filed matters of record, and having made a de novo review and determination in accordance with the requirements of 28 U.S.C. § 636 and the applicable case law, e.g., Campbell v. United States District Court, 501 F. 2d 196, 206 (9th Cir. 1974), that the Magistrate's Order is correct and not contrary to applicable law, the court hereby

AFFIRMS the Order of the United State Magistrate designated above (#193), and DENIES and OVERRULES plaintiffs' opposition and objections (#198). Accordingly,

IT IS ORDERED that plaintiffs' counsel, Janice M. Hayes, shall pay $1,000.00 in sanctions to Defendant Ghanem, $1,000 in sanctions to defendant Byer, and $1,000.00 in sanctions to defendant Las Vegas Medical Center. After reviewing the numerous pleadings, motions and other

papers filed by plaintiffs' counsel in this case, the Court agrees with the Magistrate that most of these documents are so without factual and legal foundation as to considered "frivolous or unreasonable." Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 857 (C.D. Cal. 1984); see also Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F. 2d 1531, 1537-38 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F. 2d 823, 831 (9th Cir. 1986); Orange Production Credit Association v. Frontline Ventures Limited, 792 F.2d 797, 800 (9th Cir. 1986). By filing such meritless motions, plaintiffs' counsel has forced defendants Ghanem, Byer and Las Vegas Medical Center to continue as parties in this litigation, incurring substantial costs, for more than fourteen months after they were dismissed by order of the Court. Plaintiffs' counsel has provided no justification for pursuing

such a course of action--one which "a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." In re TCI Limited, 769 F.2d 1151, 1154 (7th Cir. 1986). Therefore, the Court concludes thatRule 11 sanctions are appropriate.

IT IS SO ORDERED.

DATED this 8th day of July, 1987.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, etc., et al.,

Plaintiffs,

BALLY'S, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed February 23, 1989)

Decision by Court.

IT IS ORDERED AND ADJUDGED Pursuant to the Court's Order entered August 10, 1988, this action is DISMISSED, and Judgment is hereby entered in favor of Defendants and against Plaintiffs.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased, etc., et al.,

Plaintiffs,

BALLY'S, INC., et al.,

Defendants.

O R D E R

(Filed February 23, 1989)

Pursuant to the Court's Order of January 11, 1989 (#323), the parties to this action have submitted status reports to the Court regarding the issue of whether, and to what extent, further Judgments must be entered in this case to finalize all proceedings and enable Plaintiff to perfect appropriate appeals. (Documents #326, #330, #331, #333 and #334.) The Court having read the status reports submitted, and in accordance with the provisions of

Rule 58 of the Federal Rules of Civil Procedure.

IT IS ORDERED that the Clerk of Court shall forthwith enter Judgment in favor of Defendants and against Plaintiffs in accordance with the Court's Order Dismissing this action entered August 10, 1988 (#305).

DATED: February 21, 1989.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-84-447-PMP

KATHLEEN JO PRICE, JANINE ADAMICK, individually and as Administratrix of the ESTATE OF KATHLEEN JO PRICE, Deceased, JOSEPH ADAMICK,

Plaintiffs,

MGM, INC., a Delaware corporation, dba MGM GRAND HOTELS, INC., et al.,

Defendants.

STIPULATION AND ORDER

(Filed April 29, 1985)

IT IS HEREBY STIPULATED AND AGREED by between David J. Rivers of the law firm of Lionel, Sawyer & Collins, attorneys for MGM grand Hotel - Las Vegas, Inc., Nevada Resort Association, Burton Cohen and Arlene Sondgeroth, and Janice M. Hayes, attorney for plaintiffs herein, as follows:

1. That plaintiffs be allowed to amend the caption to the complaint herein to name MGM Grand Hotel - Las Vegas, Inc. as a party substitution for what has heretofore been named as "Dba MGM Grand Hotels, Inc.;

2. That service of process upon Bernard Segelin, by and through his executive secretary, shall be viewed as completed service upon MGM Grand Hotel-Las Vegas, Inc.;

3. That service of process upon Vincent Helm shall be viewed as completed service upon the Nevada Resort Association;

4. That upon amendment of the caption of complaint herein, plaintiff's counsel shall serve the parties to this agreement with the amended complaint;

5. That MGM Grand Hotel-Las Vegas, Inc., Nevada Resort Association, Burton Cohen and Arlene Sondgeroth, shall have

to and including May 15, 1985, in which to answer or otherwise respond to plaintiffs' amended complaint.

IT IS SO ORDERED.

DATED this 29th day of April, 1985.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

No. 89-16462

D.C. No. CV-84-447-HDM
D.C. No. CV-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased,

JANINE ADAMICK and JOSEPH ADAMICK,

Plaintiffs-Appellants,

NEVADA RESORT ASSOCIATION, et al.,

Defendants-Appellees.

ORDER

(Filed January 25, 1991)

Appeal from the United States District Court for the District of Nevada

The Honorable Howard D. McKibben, Presiding

(Not argued)

Before: BROWNING, PREGERSON and TROTT, Circuit Judges:

The petition for rehearing, filed

January 2, 1991, is denied. The Motion For Correction Of Clerical Errors In Docket Sheets, Orders, Records And Documents To Reflect That The Nevada Resort Association Has Never Been The Lead Defendant In The District Court Nor An Appellee Herein Herein And That Bally's, Inc. Is The Lead Defendant, filed January 2, 1991, is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 87-2575, 89-16462

D.C. No. CV-84-447-HDM

D.C. No. CV-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased;

JANINE ADAMICK: JOSEPH ADAMICK,

Plaintiff-Appellants,

NEVADA RESORT ASSOCIATION, et al.,

Defendants-Appellees.

ORDER

(Filed December 14, 1990)

PREGERSON, Circuit Judge.

Appellant's motion for an extension of time to file a petition for rehearing is GRANTED. Appellant's petition for rehearing is due December 28, 1990.

UNITED STATES
POSTAL SERVICE
Las Vegas NV 81999-9998

Date: 1/7/91

Express Mail S/N B52946662

Dear Customer:

Regarding your Express Mail inquiry, please note the following:

[ ] Delivery was made 1-2-91 at mid-night.

[ ] **Attempted Delivery was made** 12-28-90 at 1:30 P.M.

[ ] Your refund is DISAPPROVED:

[[Delivery (Attempted Delivery) was made within standards.

. . .
. . .

Express Mail Manager
1001 E. Sunset Rd.
Las Vegas, NV 89100-9604